Urban Law Annual ; Journal of Urban and Contemporary Law

Volume 44

January 1993

Inmates and Artificial Insemination: A New Perspective on Prisoners' Residual Right to Procreate

Kristin M. Davis

INMATES AND ARTIFICIAL INSEMINATION: A NEW PERSPECTIVE ON PRISONERS' RESIDUAL RIGHT TO PROCREATE

Until recently, few prisoners sued prison officials for alleged deprivation of their constitutional rights.[1] Such suits appeared futile because most courts determined that prisoners necessarily surrendered their rights upon conviction.[2] Over the past thirty years, however, courts have acknowledged that some constitutional guarantees survive incarceration.[3] Although courts remain mindful of their obligation to re-

1. Barry R. Bell, Note, *Prisoner's Rights, Institutional Needs, and the Burger Court*, 72 VA. L. REV. 161, 162 (1986). Federal courts were not willing to entertain prisoner rights suits until the early 1960s. *Id.* at 163.

2. *See, e.g.*, Vitek v. Jones, 445 U.S. 480, 493 (1980) (holding that incarceration deprives a prisoner of the right to freedom from bodily restraint); Bell v. Wolfish, 441 U.S. 520, 546 (1979) (holding that prisoners do not retain the full panoply of rights held by unincarcerated individuals). Courts also based their reluctance to entertain prisoner rights suits on judicial deference to prison officials' decisions, better known as the "hands-off" approach. *See* Bell, *supra* note 1, at 162. Furthermore, courts cited the doctrines of separation of powers and federalism as additional reason for their deferential position. *Id.* at 162 n.2. *See also* Powell v. Hunter, 172 F.2d 330, 331 (10th Cir. 1949) ("The court has no power to interfere with the conduct of the prison or its discipline."); Curtis v. Jacques, 130 F. Supp. 920, 921 (W.D. Mich. 1954) (stating that federal courts lack the power to decide suits challenging state prison regulations).

3. *See* Turner v. Safley, 482 U.S. 78, 95 (1987) (holding that prisoners retain a constitutionally protected right to marry, subject to necessary restrictions); Bounds v. Smith, 430 U.S. 817, 821 (1977) (stating that prisoners retain the right of access to the judicial process); Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974) ("There is no iron curtain drawn between the Constitution and the prisons of this country."); Pell v. Procunier, 417 U.S. 817, 822 (1974) (stating that a prisoner "retains those [constitutional] rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system"); Procunier v. Martinez, 416 U.S. 396,

frain from judicial activism on issues dealing with prison administration,[4] they also recognize a responsibility to intervene when officials unconstitutionally deprive inmates of their limited residual rights.[5]

The judiciary's increased willingness to consider prisoner rights claims has spawned widespread litigation in this area.[6] Recently, several death row inmates at San Quentin Prison filed suit against the State of California, claiming that the prison's policy against artificial insemination denied them of the constitutional right to procreate.[7] Such novel lawsuits test the limit to which courts will extend constitutional privacy protections to inmates and also to their spouses, upon whose rights prison policies may directly impinge.

Part I of this Note examines the interests of the various parties involved when prisoners allege that officials deprived them of their constitutional right of privacy.[8] Part II describes the standards that the

405-06 (1974) ("When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights." (citing Johnson v. Avery, 393 U.S. 483, 486 (1969)); Lee v. Washington, 390 U.S. 333, 333-34 (1968) (per curiam) (holding that prisoners retain the right to equal protection).

4. Courts recognize that they lack the expertise to make broad, reasoned judgments regarding prison rules and regulations. *See, e.g.*, Turner v. Safley, 482 U.S. at 85 ("Prison administration is, [ ] a task that has been committed to the responsibility of [the legislative and executive] branches, and separation of powers concerns counsel a policy of judicial restraint."); Block v. Rutherford, 468 U.S. 576, 584-85 (1984) (noting that courts should defer to the "expert judgment" of prison administrators); Bell v. Wolfish, 441 U.S. at 540-41 n.23 (stating that courts should defer to prison officials' adoption and implementation of policies necessary for order and security).

5. *See* Bell, *supra* note 1, at 163. Other commentators argue that the erosion of the "hands-off" policy has only eliminated the major constitutional deprivations prisoners suffer. *See* DAVID RUDOVSKY ET AL., THE RIGHTS OF PRISONERS xiii (4th ed. 1988). They allege that, in reality, most prisoners' constitutional rights remain merely illusory. *Id.*

6. Due to numerous victories in prisoner rights cases, prisoners felt encouraged to file suit, resulting in a thirty-fold increase in prisoner § 1983 suits between 1966 and 1976. Kenneth C. Haas, *Judicial Politics and Correctional Reform: An Analysis of the Decline of the "Hands-Off" Doctrine*, 1977 DET. C.L. REV. 795, 823.

7. Anderson v. Vasquez, No. 91-4540, 1992 U.S. Dist. LEXIS 13512, at *7-8 (N.D. Cal. Aug. 24, 1992). The prisoners filed suit under § 1983 on behalf of fourteen death row inmates, their spouses, and other women who would choose to bear their children. Jim Doyle, *Death Row Inmates Want to Be Fathers*, S.F. CHRON., Dec. 31, 1991, at A13. They claim that prison policies forbidding access to artificial insemination violate their constitutional right to procreate. *Id.*

8. *See infra* notes 15-76 and accompanying text for a discussion of the various interests implicated in prisoner rights suits.

Supreme Court has promulgated for analyzing prisoner rights suits.[9] Part III discusses the issues involved when prisoners sue for access to artificial insemination, and explores the implications of denying the San Quentin inmates' request.[10]

I. COMPETING INTERESTS IN PRISONER RIGHTS CASES

Courts facing prisoner rights claims must invariably balance the competing interests of prison administrators,[11] inmates,[12] and those ci-

9. *See infra* notes 80-146 and accompanying text for a detailed description of the standards the Supreme Court has articulated for reviewing prisoner rights suits.

10. *See infra* notes 148-197 and accompanying text for a discussion of the issues in artificial insemination suits and their effect on the San Quentin case.

11. In varied contexts courts have found the interests of prison administrators to outweigh those of inmates. *See, e.g.*, Cooper v. Tard, 855 F.2d 125, 128-30 (3d Cir. 1988) (holding that a prison regulation prohibiting unsupervised group activities served legitimate security interests and outweighed the free exercise rights of prisoners desiring to hold unsupervised prayer meetings); Howland v. Kilquist, 833 F.2d 639, 643-44 n.1 (7th Cir. 1987) (stating, in dictum, that there was no denial of right of access when officials refused to deliver legal materials sent from a prisoner's fiancee due to legitimate concerns that mail could contain contraband); Rios v. Lane, 812 F.2d 1032, 1034-37 (7th Cir. 1987) (holding that the legitimate need to eliminate prison gang activity justified the disciplinary measures against an inmate who was communicating a revolutionary slogan to a gang member), *cert. denied*, 483 U.S. 1001 (1987); Evans v. Johnson, 808 F.2d 1427, 1428 (11th Cir. 1987) (per curiam) (holding that limiting visitation privileges was valid in order to serve legitimate penological objectives); Spence v. Farrier, 807 F.2d 753, 755 (8th Cir. 1986) (stating that security interests concerning narcotics use justified a policy requiring random urine tests); Hernandez v. Estelle, 788 F.2d 1154, 1155-56 (5th Cir. 1986) (per curiam) (stating that an interest in security justified a prison official's refusal to distribute revolutionary material during period of prison turmoil); Cookish v. Cunningham, 787 F.2d 1, 5-6 (1st Cir. 1986) (holding that the temporary denial of the use of the prison library was constitutional if necessary for prison security and order); Gibbs v. King, 779 F.2d 1040, 1045 (5th Cir. 1986) (holding that the prison's interest in preventing tension from escalating justified a regulation prohibiting inmates from using profanities toward employees), *cert. denied*, 476 U.S. 1117 (1986).

12. Numerous courts have found that inmates' rights outweigh those of the prison's. *See, e.g.*, Hutto v. Finney, 437 U.S. 678, 682, 687 (1978) (stating that a punitive confinement of numerous prisoners in an 8-by-10 foot space for over 30 days constituted cruel and unusual punishment); Johnson v. Avery, 393 U.S. 483, 490 (1969) (holding that a prison may not prohibit inmates from assisting other inmates with habeas corpus petitions); Ching v. Lewis, 895 F.2d 608, 610 (9th Cir. 1990) (holding that regulations denying an inmate contact visits and compelling him to talk with his lawyer through a hole in the glass violated the right to meaningful access); Sample v. Diecks, 885 F.2d 1099, 1115-16 (3d Cir. 1989) (holding that a prisoner's interest in claiming unlawful detention outweighed the prison's administrative burden of hearing the claim); Tribble v. Gardner, 860 F.2d 321, 325-26 (9th Cir. 1988) (finding that punitive digital rectal searches violated an inmate's constitutional rights), *cert. denied*, 490 U.S. 1075 (1989);

vilians whose constitutional rights are threatened by the enforcement of the prison regulations.[13] While prisoner rights cases typically involve a broad spectrum of constitutional issues,[14] the suits that most significantly implicate the three competing interests are those which challenge rules restricting certain aspects of a prisoner's right of privacy.

A. *Prisoners and the Zone of Privacy*

The Supreme Court has recognized that one liberty interest protected by the Fourteenth Amendment[15] is a "right of personal privacy, or a guarantee of certain areas or zones of privacy."[16] Personal choices concerning marriage,[17] procreation,[18] contraception,[19] child rearing,[20]

DeMallory v. Cullen, 855 F.2d 442, 448 (7th Cir. 1988) (stating that general security concerns were insufficient to prohibit segregated inmates from using the library, conferring with paralegals, and participating in a legal training program); Brooks v. Andolina, 826 F.2d 1266, 1268-69 (3d Cir. 1987) (holding that a prison's security interests do not justify punishing an inmate for expressing grievances to the NAACP).

13. Few courts express a willingness to account for the burdened rights of free citizens. *But see* Blackburn v. Snow, 771 F.2d 556, 564 (1st Cir. 1985) (holding that a body cavity search violated a prison visitor's right to privacy despite the prison's interest in intercepting illegal contraband).

14. *See, e.g.*, Moss v. Clark, 886 F.2d 686, 689 (4th Cir. 1989) (discussing whether a prison transfer that resulted in a loss of "good time credits" violated a prisoner's due process rights); United States v. Willoughby, 860 F.2d 15, 20-22 (2d Cir. 1988) (addressing whether a prison officials' recording of a conversation between a prisoner and his girlfriend violated the prisoner's Fourth Amendment rights); Howland v. Kilquist, 833 F.2d 639, 641-44 (7th Cir. 1987) (determining whether a court's refusal of a prisoner's request for counsel denied him meaningful access to courts).

15. The Fourteenth Amendment provides in pertinent part: "No state shall . . . deprive any person of life, liberty, or property, without due process of the law." U.S. CONST. amend. XIV, § 1.

16. Roe v. Wade, 410 U.S. 113, 152 (1973).

17. Loving v. Virginia, 388 U.S. 1, 12 (1967) (holding unconstitutional a statute that prohibited interracial marriages).

18. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (striking down a state statute that provided for the sterilization of those inmates convicted of felonies involving moral turpitude). *See infra* notes 28-34 for an in-depth discussion of *Skinner*.

19. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (holding that the constitutional right of privacy includes an individual's decision whether or not to use contraceptives).

20. Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (holding that parents have a privacy right in deciding whether their children should attend public or private school).

and abortion,[21] comprise privacy zones that courts shelter against unjustified governmental interference.[22] Imprisonment necessarily limits certain aspects of prisoners' privacy rights.[23] Prisoners retain, however, those constitutional rights that are not fundamentally inconsistent with their status as inmates.[24] Many courts have determined that prisoners' privacy interests may survive incarceration, and, furthermore, outweigh regulations burdening them.[25] Therefore, while prison officials may restrict inmates' residual privacy interest in procreational choice, the power to create such restrictions is not unlimited.[26]

The Supreme Court has consistently recognized the fundamental right of procreational choice.[27] The landmark Supreme Court decision acknowledging prisoners' interest in procreation is *Skinner v. Oklahoma ex rel. Williamson*.[28] In *Skinner*, the Court considered the constitutionality[29] of a state statute mandating compulsory sterilization

21. Roe v. Wade, 410 U.S. 113, 152-53 (1973) (holding that the right to privacy includes a woman's decision whether or not to have an abortion).

22. When state regulations impinge on an individual's right of privacy, courts will uphold the regulations only when the state articulates a compelling interest. *See* Roe v. Wade, 410 U.S. at 155-56 (holding that a state may regulate abortions only when its interest is compelling).

23. *See, e.g.*, Block v. Rutherford, 468 U.S. 576, 589 (1984) (holding that an official may deny a detainee's privacy interest in contact visits with family for security reasons); Department of Corrections v. Roseman, 390 So.2d 394, 395 (Fla. Dist. Ct. App. 1980) (holding that prison inmates retain no fundamental right to marry).

24. *See, e.g.*, Pell v. Procunier, 417 U.S. 817, 822 (1974) (stating that "a prison inmate retains those . . . rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system").

25. *See, e.g.*, Turner v. Safley, 482 U.S. 78, 97-98 (1987) (holding that while the right to marry may be regulated within reason, a virtual ban on prisoner marriages evidences a magnified response to security needs and therefore is not reasonably related to any legitimate objectives).

26. *See infra* notes 27-44 and accompanying text for a discussion of case law outlining permissible and impermissible restrictions.

27. *See* Carey v. Population Servs. Int'l, 431 U.S. 678, 685 (1977) ("[T]he decision whether or not to beget or bear a child is at the very heart of [the] cluster of constitutionally protected choices."); Stanley v. Illinois, 405 U.S. 645, 651 (1972) (the "rights to conceive and raise one's children have been deemed 'essential,' 'basic civil rights of man,' and '[r]ights far more precious . . . than property rights.' " (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); May v. Anderson, 345 U.S. 528, 533 (1953))); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusions into matters so fundamentally affecting a person as the decision whether to bear or beget a child.").

28. 316 U.S. 535 (1942).

29. The case involved a challenge to the Oklahoma Habitual Criminal Sterilization

of certain classes of prisoners.[30] The Court expressly determined that the statute infringed on a prisoner's right to procreate, a right "fundamental to the very existence and survival of the race."[31] The Court voiced grave reservations about placing the power to sterilize in the hands of the State.[32] The Court noted the need to strictly scrutinize statutes that irreparably deprive certain individuals of the basic right to procreate.[33] Because the statute treated similarly situated prisoners unequally, the Court struck it down as violative of the Equal Protection Clause.[34] *Skinner* evidences, therefore, the Court's recognition that inmates retain some right of procreation. Otherwise the Court presumably would have allowed prison officials to remove indiscriminately prisoners' procreational capacity.

Another recognized aspect of the fundamental right to procreate is a woman's right to decide whether to continue or terminate a pregnancy.[35] In *Monmouth County Correctional Institutional Inmates v. Lanzaro*,[36] the Third Circuit Court of Appeals determined the consti-

---

Act, which gave courts the power to sterilize "habitual" criminals, those criminals with multiple convictions for "felonies involving moral turpitude." *Id.* at 536. The statute applied equally to male and female criminals. *Id.* at 537. The statute did not apply, however, to all classes of crimes. *Id.* It exempted "offenses arising out of the violation of the prohibitory laws, revenue acts, embezzlement, or political offenses." *Id.*

30. *Id.* at 537-38. While the state urged that the statute was necessary to prevent prisoners from perpetuating their evil traits, the defendant argued that the state unconstitutionally denied him the opportunity to be heard on the question of whether it was probable he would parent potentially criminal offspring. *Id.* at 538. The defendant also asserted that the statute served a penal function and therefore constituted cruel and unusual punishment in violation of the Fourteenth Amendment. *Id.*

31. *Id.* at 541.

32. *Id.* The Court recognized that the power to sterilize could have devastating effects: "In evil or reckless hands it can cause races or types which are inimical to the dominant group to whither and disappear. There is no redemption for the individual whom the law touches." *Id.*

33. *Skinner*, 316 U.S. at 541.

34. *Id.* at 541-42. The Court struck down the statute because it distinguished between defendants who committed larceny and those who committed embezzlement, even though the two crimes were intrinsically the same and, apart from the sterilization provision, engendered the same penalties under Oklahoma law. *Id.* The Court likened this type of invidious discrimination to unconstitutional classifications based on race or national origin. *Id.* at 541.

35. *See* Roe v. Wade, 410 U.S. 113, 153-54 (1973) (holding that the constitutional right of privacy is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy," and imposing a requirement that the government articulate a compelling interest for invading that right).

36. 834 F.2d 326 (3d Cir. 1987), *cert. denied*, 486 U.S. 1006 (1988).

tutionality of a prison policy[37] requiring female inmates to obtain court-ordered releases and their own financing to secure nontherapeutic abortions.[38] The court recognized that prison officials legitimately may evaluate financial considerations[39] when determining how to provide access to constitutionally mandated services.[40] It noted, however, that the costs incurred in accommodating prisoners' constitutional rights cannot justify the complete deprivation of these rights.[41] The court determined that administrative inconvenience alone was insufficient to justify denying female prisoners the right of access to abortion facilities.[42] The court therefore struck down the policy as an impermissible burden on female prisoners who retained a fundamental right to choose whether to terminate their pregnancies.[43]

Skinner and *Lanzaro* demonstrate that the right to procreate falls

37. *Id.* at 328. The Institution's policy provided for abortions only when necessary to save the life of the mother. *Id.*

38. The inmates argued that the policy infringed on their constitutionally protected right of privacy under *Roe*. *Id.* at 329. They also contended that the policy evidenced the Institution's deliberate indifference to their medical needs in violation of the Eighth Amendment. *Id.*

39. The Institution argued that the policy reflected its legitimate interest in avoiding the insurmountable administrative and monetary burdens it would sustain if required to fulfill the inmates' abortion requests. *Id.* at 336.

40. *Id.* at 337. The court noted that the Institution did not argue that a woman's right to abortion does not survive incarceration, for that argument would be inconsistent with federal prison policy which provides prisoners with abortions upon request. *Id.* at 334 n.11 (citing 28 C.F.R. § 551.23(d) (1986)).

41. 834 F.2d at 337 (quoting Bounds v. Smith, 430 U.S. 817, 825 (1977)). Other courts are in accord with the proposition that costs alone do not justify the deprivation of a prisoner's constitutional rights. *See, e.g.*, Hamm v. DeKalb County, 774 F.2d 1567, 1573 (11th Cir. 1985) (noting that a "state's interest in limiting the cost of detention . . . will justify neither the complete denial of [food, living space, and medical care] nor the provision of those necessities below some minimally adequate level"), *cert. denied*, 475 U.S. 1096 (1986); Wright v. Rushen, 642 F.2d 1129, 1134 (9th Cir. 1981) ("[C]osts cannot be permitted to stand in the way of eliminating conditions below Eighth Amendment standards."); Battle v. Anderson, 594 F.2d 786, 792 (10th Cir. 1979) ("[C]onstitutional treatment of human beings confined to penal institutions . . . is not dependent upon the . . . financial ability of the state . . . . " (quoting Gates v. Collier, 407 F. Supp. 1117, 1120-21 (N.D. Miss. 1975)); Newman v. Alabama, 559 F.2d 283, 286 (5th Cir. 1977) ("[C]ompliance with constitutional standards may not be frustrated by . . . failure to provide the necessary funds.").

42. 834 F.2d at 337. The court determined that the court-order requirement, because of its inevitable delays, effectively denied female prisoners access to abortions. *Id.*

43. *Id.* at 351. The court not only struck down the court-order provision, it also ordered the Institution to provide prisoners funding and transportation for abortions. *Id.* at 351-52.

within the cluster of constitutionally protected rights that survive incarceration. Prison policies and regulations may not burden this right absent, at a minimum, a logical connection between the exercise of that right and legitimate penological interests.[44]

B. *Legitimate Penological Interests*

Courts traditionally abstained from reviewing prison regulations that burdened inmates' constitutional rights.[45] Courts hesitated to interfere with prison policies for a number of reasons, including (1) the separation of powers doctrine;[46] (2) federalism concerns;[47] (3) the lack of judicial expertise in prison administration;[48] (4) sensitivity to the

44. *See infra* notes 80-146 and accompanying text for a discussion of the standards the Supreme Court has articulated for reviewing prison regulations that burden inmates' constitutional rights.

45. The courts' "hands-off" doctrine initially reflected the view that prisoners were slaves, stripped of any enforceable rights whatsoever. *See* Haas, *supra* note 6, at 797. Later, widespread judicial opinion reflected the view that criminals were not entitled to the same privileges that law-abiding citizens enjoy. *Id.*

46. *See, e.g.*, Goff v. Nix, 803 F.2d 358, 362 (8th Cir. 1986) ("[M]anagement of corrections institutions is peculiarly the responsibility of the executive and legislative branches of government . . ."), *cert. denied*, 484 U.S. 835 (1987); Meadows v. Hopkins, 713 F.2d 206, 209-10 (6th Cir. 1983) ("[E]xpertise, comprehensive planning, and the commitment of resources [are] all . . . within the province of the legislative and executive branches of government." (quoting Procunier v. Martinez, 416 U.S. 396, 405 (1974)); Feeley v. Sampson, 570 F.2d 364, 371 (1st Cir. 1978) (holding that courts must refrain from substituting their judgment for that of legislators and prison administrators); Wooden v. Norris, 637 F. Supp. 543, 555 (M.D. Tenn. 1986) (noting that the resolution of " 'complex and intractable' prison problems" belongs to legislative and executive branches (quoting Procunier v. Martinez, 416 U.S. 396, 405 (1974)). *See also* Ronald L. Goldfarb & Linda A. Singer, *Redressing Prisoners' Grievances*, 39 GEO. WASH. L. REV. 175, 181 (1970) (discussing the notion that judicial intervention on behalf of prisoner rights would violate the separation of powers doctrine).

47. *See* Hall v. Maryland, 433 F. Supp. 756, 778-79 (D. Md. 1977) (discussing principles of "federalism and comity" in the prison context).

48. *See, e.g.*, Pell v. Procunier, 417 U.S. 817, 827 (1974) (noting that rehabilitation and institutional security considerations "are peculiarly within the province and professional expertise of corrections officials, and, . . . courts should ordinarily defer to their expert judgment in such matters"); Abdul Wali v. Coughlin, 754 F.2d 1015, 1018 (2d Cir. 1985) (recognizing that because prison officials acquire expertise in managing prisons, courts must defer to their professional judgment in the majority of cases). *See also* Special Project, *Behind Closed Doors: An Empirical Inquiry Into the Nature of Prison Discipline in Georgia*, 8 GA. L. REV. 919, 921 (1974) ("[P]rison officials are experts and it is better to defer to their judgment than risk frustration of penological objectives by ill-advised judicial meddling."). *But see* Janet R. Burnside, Note, *Involuntary Interprison Transfers of State Prisoners After* Meachum v. Fano *and* Montayne v. Haymes, 37 OHIO ST. L. J. 845, 880 (1976) ("The Court may with good reason believe that

difficulty of prison management;[49] and (5) general deference to prison officials' judgments.[50] While courts now demonstrate increased willingness to intervene on behalf of inmates, the standards they employ to review prisoner rights cases exhibit the broad latitude given to prison administration concerns.[51]

The Supreme Court has identified several legitimate penological interests, including preserving institutional order and discipline, maintaining security to protect against escape or unauthorized entry, and achieving prisoner rehabilitation.[52] When officials invoke these interests to defend against allegations that prison rules regulating or proscribing contact visitation violate inmates' constitutional right of privacy,[53] courts accord them a high degree of deference.[54]

---

federal judges are not expert [sic] in managing penal institutions, but it is doubtful whether state prison authorities are any more adept at determining when constitutional interests should be protected.").

49. *See, e.g.*, Wolff v. McDonnell, 418 U.S. 539, 566 (1974) (asserting that the operation of a prison is exceedingly difficult and courts must afford officials the necessary discretion); Bumgarner v. Bloodworth, 768 F.2d 297, 300-01 (8th Cir. 1985) (noting that prison administration is "at best an extraordinarily difficult undertaking" (quoting Hewitt v. Helms, 459 U.S. 460, 467 (1983)).

50. *See, e.g.*, Bell v. Wolfish, 441 U.S. 520, 547 (1979) ("Prison administrators . . . should be accorded wide-ranging deference in adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security."); Cruz v. Beto, 405 U.S. 319, 321 (1972) (per curiam) (acknowledging that courts should accord prison administrators latitude in their decision-making).

51. *See infra* notes 81-146 and accompanying text for discussion of the standard of review applied in prisoner rights cases. Although the Court in Thornburgh v. Abbott, 490 U.S. 401, 414 (1989), proposed that its reasonableness standard of review for prisoner rights cases was not a "rubber stamp" on regulations, some commentators argue that the current test is "toothless." *See The Supreme Court, 1988 Term: Leading Cases*, 103 HARV. L. REV. 137, 247 (1989).

52. *See* O'Lone v. Estate of Shabazz, 482 U.S. 342, 348 (1987).

53. *See* Bell v. Wolfish, 441 U.S. 520, 540 (1979) (holding that prisons "must be able to take steps to maintain security and order . . . and make certain no weapons or illicit drugs reach detainees" through contact with outsiders).

54. The Supreme Court has determined that a prison's security interests are "central to all other correctional goals." Pell v. Procunier, 417 U.S. 817, 823 (1974). Other courts have also recognized the importance of a prison's security interests. *See, e.g.*, Solomon v. Zant, 888 F.2d 1579, 1582 (11th Cir. 1989) (upholding a requirement that a death row inmate shave his head before meeting with his attorney because necessary for security reasons); Caldwell v. Miller, 790 F.2d 589, 606 (7th Cir. 1986) (holding that a prohibition on library access is legitimate as part of a post-riot "lockdown"); Cookish v. Cunningham, 787 F.2d 1, 5-6 (1st Cir. 1986) (finding that a temporary denial of prison library privileges is permissible if necessary to maintain internal security and order).

In *Block v. Rutherford*,[55] the Court upheld a county jail's blanket prohibition on contact visitation with pretrial detainees.[56] The Court noted that the ban on contact visits was necessary to achieve the jail's legitimate interest in maintaining security.[57] The Court cited various security problems accompanying contact visitation, such as the introduction of drugs, weapons, and other contraband into the prison complex,[58] and the possibility that detainees may hold innocent visitors hostage during an escape attempt.[59] Yielding to the experienced judgment of the jail's administrators,[60] the Court held that the prophylactic measures did not violate the detainees' constitutional right of privacy.[61]

Because virtually all courts uphold restrictions on contact visitation on grounds of prison security, they unanimously agree that prisoners have no constitutional right of consortium[62] with their spouses.[63]

---

55. 468 U.S. 576 (1984).

56. *Id.* at 592. The Los Angeles County Central Jail, which contains over 5,000 inmates and is the largest jail in the United States, enacted the policy. *Id.* at 578. While the jail did not allow contact visits, it did grant inmates noncontact visits, allowing prisoners to see visitors through a glass partition and talk with them on a telephone. *Id.* at 578 n.1.

57. *Id.* at 586.

58. *Id.* The Court noted that visitors, especially children, could easily conceal contraband and covertly slip it to a detainee. *Id.* The Court also noted that it upheld, in Bell v. Wolfish, 441 U.S. 520, 558-60 (1979), a more intrusive prison practice of conducting routine body cavity searches for contraband after contact visits. *Block*, 468 U.S. at 587. Lower courts, also sensitive to security concerns surrounding contact visits, have upheld such searches. *See, e.g.*, Franklin v. Lockhart, 883 F.2d 654, 656 (8th Cir. 1989) (holding that visual body cavity strip searches of inmates were reasonable responses to security concerns); Bruscino v. Carlson, 854 F.2d 162, 164-65 (7th Cir. 1988) (holding that inmate rectal searches were not unconstitutional when such searches result in seizure of "astonishing quantit[ies]" of contraband, and evidence showed a decline in prison violence as a consequence of the policy).

59. *Block*, 468 U.S. at 586-87.

60. *Id.* at 588. The Court admonished the trial court for balancing the detainees' interests against those of the jail. *Id.* at 589. The Court determined that once the trial court recognized the many factors militating against contact visits, its inquiry should have ended. *Id.*

61. *Id.* at 589. The Court rejected the lower courts' contention that alternatives existed which would accommodate both parties' interests. *Id.* at 587. The Court determined that forcing the jail to identify minimal security risk detainees and allowing them contact visits would impose impossible burdens on jail administrators. *Id.*

62. Some states, while not constitutionally obligated, have implemented formal conjugal visit programs. *See* Shaun C. Esposito, Note, *Conjugal Visitation in American Prisons Today*, 19 J. FAM. L. 313, 319-25 (1980-81) (describing the programs adopted by Mississippi, California, New York, South Carolina, and Minnesota and noting their success). The United States Bureau of Prisons, the body that controls the federal prison

While courts recognize that prisoners' interests in procreational choice[64] and marriage[65] survive incarceration, they conclude that the concomitant interest in maintaining a sexual relationship is logically inconsistent with an individual's incarceration[66] and a prison's interest in security.[67] Furthermore, despite the fact that proscriptions on conjugal visitation directly infringe the procreational rights of prisoners' spouses, courts continue to emphasize and yield to a prison's interest in maintaining security.[68]

---

system, however, has never adopted such a program. *See* Thomas M. Bates, Note, *Rethinking Conjugal Visitation in Light of the "AIDS" Crisis*, 15 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 121, 121 (1989).

63. *See* EDWIN POWERS, CRIME AND JUSTICE FOUNDATION, CONSTITUTIONAL RIGHTS OF PRISONERS, Part Three, Topic 4, 14 (1983). Only one federal court has declared that the right to conjugal visits exists. *See* Virgin Islands v. Gereau, 3 PRISON L. RPTR. 20 (D.V.I. 1973) (holding that pretrial detainees held for a long period of time have a constitutional right to conjugal visits).

64. *See supra* notes 27-44 and accompanying text for discussion of prisoners' surviving interest in procreational choice.

65. *See infra* notes 109-114 and accompanying text for discussion of prisoners' surviving interest in marriage.

66. Some evidence suggests, however, that conjugal visits actually improve prisoners' dispositions, thereby creating a less violent prison atmosphere. *See* Imprisoned Citizens Union v. Shapp, 451 F. Supp. 893, 898 (E.D. Pa. 1978) (upholding a denial of conjugal visits despite expert testimony that denial of such visits results in physical and emotional stress and could lead to deviant sexual behavior, violence, and self-destruction). Commentators also suggest that conjugal visits strengthen rehabilitative efforts. STANLEY L. BRODSKY, FAMILIES AND FRIENDS OF MEN IN PRISON 17 (1975) (noting that inmates that maintained strong family ties were more successful parolees than inmates denied such relationships).

67. *See, e.g.*, Lyons v. Gilligan, 382 F. Supp. 198, 200 (N.D. Ohio 1974) (holding that the state is not obligated to make private places available for prisoners to maintain sexual relations because intrusion of a prisoner's privacy rights while he is incarcerated "is not tantamount to an intrusion of the prisoner's home"); McGinnis v. Stevens, 543 P.2d 1221, 1238 (Alaska 1975) (rejecting a claim based on the fundamental right of marital privacy and finding that "notions of privacy of the marital bed [are inconsistent] with the compelling state interest in incarceration of offenders.").

Courts have also upheld regulations prohibiting conjugal visits against Eighth Amendment attacks. *See, e.g.*, Imprisoned Citizens Union v. Shapp, 451 F. Supp. 893, 899 (E.D. Pa. 1978) (concluding that the prohibition on sexual contact does not "shock the conscience" and is not "disproportionate punishment" in violation of the Eighth Amendment). One commentator argues, however, that changing standards regarding what constitutes cruel and unusual punishment may lead courts to reconsider conjugal visit cases. *See* Esposito, *supra* note 62, at 319.

68. *See* Virginia L. Hardwick, Note, *Punishing the Innocent: Unconstitutional Restrictions on Prison Marriage and Visitation*, 60 N.Y.U. L. REV. 275, 282 (1985) (noting that no court has decided the constitutionality of visitation regulations based on the rights of the inmate's family).

C. *Implicated Third-Party Interests*

Virtually all prison regulations necessarily have an incidental impact on the rights of civilians who associate with inmates.[69] Because of institutional concerns regarding security and rehabilitation,[70] however, courts almost unanimously uphold even those regulations that directly affect third parties.[71] Courts invariably disregard third parties' rights by focusing solely on the interests of the inmates and prison administrators.[72] Some commentators urge courts to be more exacting when reviewing prison regulations that implicate the fundamental rights of nonprisoners.[73] While most courts do not adhere to this view, some occasionally weigh third party interests against the institution's asserted penological concerns.[74] These courts acknowledge that

69. *See* Morrissey v. Brewer, 408 U.S. 471, 482 (1972) (implying that incarceration logically deprives an inmate and family of freedom "to form the . . . enduring attachments of normal life"); Southerland v. Thigpen, 784 F.2d 713, 717-18 (5th Cir. 1986) (noting that imprisonment affects the inmate's family relations).

70. *See supra* notes 52-68 and accompanying text for discussion of legitimate penological concerns.

71. For instance, courts uphold prison regulations restricting prisoners' visitation rights despite the obvious impact on the visitors' associational rights. *See, e.g.*, Block v. Rutherford, 468 U.S. 576, 586-89 (1984) (upholding prison regulation forbidding pretrial detainees contact visits); Bellamy v. Bradley, 729 F.2d 416, 420 (6th Cir. 1984) (finding that prisoners "have no absolute constitutional right to visitation"), *cert. denied*, 469 U.S. 845 (1984); Craig v. Hocker, 405 F. Supp. 656, 674 (D. Nev. 1975) (stating that inmates have no absolute freedom of association so long as prison provides reasonable alternatives).

72. *See, e.g.*, Thornburgh v. Abbott, 490 U.S. 401 (1989) (focusing on the rights of inmates even though the prison regulation burdened First Amendment rights of publishers wanting to deliver materials into prison); Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119 (1977) (focusing on prisoners' rights despite fact that the rules at issue infringed on the union's constitutional right to send its literature into prison). Even in cases where the plaintiff is a civilian, courts usually focus only on the rights of the prisoner. *See, e.g.*, Hudson v. Rhodes, 579 F.2d 46, 46 (6th Cir. 1978) (upholding a policy forbidding the marriage of incarcerated individuals), *cert. denied*, 440 U.S. 919 (1979); Salisbury v. List, 501 F. Supp. 105, 110 (D. Nev. 1980) (striking down prison procedure denying unincarcerated women the right to marry inmates, not because it infringed women's rights, but because it was irrational); Koerner v. New Jersey Dep't of Correction and Marriage Licensing Officer, 394 A.2d 1262, 1264 (N.J. Super. Ct. Law Div. 1978) (holding that a denial of a request to marry outside prison did not violate prisoner's rights).

73. *See* Hardwick, *supra* note 68, at 275 (arguing that when prison regulations infringe on a civilian's constitutional rights, courts must examine them from the civilian's perspective).

74. *See, e.g.*, Turner v. Safley, 482 U.S. 78, 97 (1987) (acknowledging that prison rules regulating marriage burden civilians' fundamental right to marry); Procunier v.

although prisoners necessarily waive certain constitutional rights as an incident to their incarceration, it does not automatically follow that those parties associated with them simultaneously waive their rights.[75] These few courts are inclined to depart from their traditional "hands-off" posture and review more stringently regulations that implicate civilians' rights.[76]

II. STANDARD OF REVIEW FOR PRISONER RIGHTS CASES

Because courts confirmed that inmates retained limited constitutional rights upon incarceration, they could not continue to rubber stamp prison regulations that infringed those rights.[77] The movement away from the "hands-off" doctrine compelled courts to reconcile prisoners' rights, and potentially civilians' rights, with institutional interests in effective administration and rehabilitation.[78] This attempted reconciliation resulted in courts applying inconsistent standards.[79] In response, the Supreme Court sought to formulate a unified standard of review for prisoner rights cases.

Martinez, 416 U.S. 396, 409 (1974) (focusing on regulation's infringement of wife's constitutional rights when she was prohibited from sending mail to and receiving mail from her inmate husband); Blackburn v. Snow, 771 F.2d 556, 568-69 (1st Cir. 1985) (holding that prison policy requiring strip search violated visitor's constitutional rights); Agron v. Montanye, 392 F. Supp. 455, 456 (W.D.N.Y. 1975) (noting in dicta that "it is . . . critical to assess the interests of family members who need and want to visit with the inmate").

75. *See* Hardwick, *supra* note 68, at 275 n.6.

76. *See infra* notes 80-96 and accompanying text for an examination of the standard some courts employ when reviewing regulations burdening civilians.

77. *See supra* notes 3-5 and accompanying text for a discussion of the movement away from the "hands-off" doctrine.

78. Note, *Constitutional Rights of Prisoners: The Developing Law*, 110 U. PA. L. REV. 985, 986-87 (1962).

79. Some courts continued to employ a "hands-off" approach to prisoner rights cases. *See, e.g.*, McCloskey v. Maryland, 337 F.2d 72, 74 (4th Cir. 1964) ("Because prison officials must be responsible for the security of the prison . . . they must have wide discretion in promulgating rules to govern the prison population and in imposing disciplinary sanctions for their violation."). Other courts applied traditional rational basis review to prison regulations that restricted prisoners' rights. *See, e.g.*, Sostre v. McGinnis, 442 F.2d 178, 199 (2d Cir. 1971) (holding that the traditional practice of restricting inmate correspondence is rationally based and constitutionally acceptable), *cert. denied sub nom*, Oswald v. Sostre, 405 U.S. 978 (1972). Still other courts applied strict scrutiny, which requires that the state assert a compelling interest for infringing on prisoners' rights. *See, e.g.*, Jackson v. Godwin, 400 F.2d 529, 537 (5th Cir. 1968) (holding that when prison officials discriminate on the basis of race, equal protection demands strict scrutiny of the policy).

A. Procunier v. Martinez *and Third Party Infringement Concerns*

In *Procunier v. Martinez*,[80] the Supreme Court considered the constitutionality of prison rules restricting the personal correspondence of inmates.[81] The Court sympathized with prison administrators who face complex and intractable problems[82] and recognized the legitimate penological concerns regarding inmate correspondence.[83] The Court asserted, however, that because the rules implicated First Amendment rights, it could not completely defer to prison administrators,[84] and therefore it developed a scheme of mutual accommodation.[85]

The Court held that censorship of prisoner correspondence must meet certain criteria to be valid.[86] First, the regulation must further an important penological interest unrelated to the suppression of unpopular ideas.[87] Second, the regulation must be no more restrictive than necessary to achieve that interest.[88] Applying these criteria, the Court noted that the prison failed to demonstrate that the regulations promoted an important interest.[89] Even if the prison had demonstrated a

80. 416 U.S. 396 (1974).

81. *Id.* at 398. The regulations censored all correspondence between prison inmates and persons other than lawyers and public officials. *Id.* at 398-99. One rule prohibited letters that "unduly complain[ed]" or that "magnif[ied] grievances." *Id.* at 399. Another prohibited writings "expressing inflammatory political, racial, religious or other views or beliefs . . . ." *Id.* Finally, one regulation precluded prisoners from "send[ing] or receiv[ing] letters that pertain to criminal activity; are lewd, obscene, or defamatory; contain foreign matter, or are otherwise inappropriate." *Id.* at 399-400.

82. *Id.* at 405. The Court recognized that the resolution of most prison problems was primarily within the province of the legislative and executive branches, where the "expertise, comprehensive planning, and . . . resources" are located. *Id.*

83. *Id.* at 412-13. The Court acknowledged that prison officials may have legitimate concerns regarding letters containing information about escape plans or other criminal activity. *Id.* at 413. Fear that prisoners would send encoded messages to others, both within and outside the system, was also a legitimate reason for censoring inmate mail. *Id.*

84. *Id.* at 405-06. The Court noted that "a policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims . . . ." *Id.* at 405.

85. 416 U.S. at 407. The Court sought to balance the prisoners' free speech interests with the prison administrators' security concerns. *Id.*

86. *Id.* at 413.

87. *Id.* While prison officials could legitimately censor prisoner mail to the extent necessary to preserve order and security, they could not do so to suppress "unflattering or unwelcome opinions or factually inaccurate statements." *Id.*

88. *Id.* at 413. The necessity for a tight fit eliminated the danger that unnecessarily broad regulations would pass constitutional muster. *Id.* at 413-14.

89. *Id.* at 415. The Director merely asserted that the prohibition against "defama-

legitimate interest, the Court determined that the regulations were broader than any legitimate penological interest warranted.[90] The Court therefore invalidated the regulations.[91]

The *Martinez* Court employed intermediate scrutiny rhetoric in finding the prison rules unconstitutional.[92] Significantly, the Court reached its conclusion without determining the extent to which a prisoner's freedom of speech survives incarceration.[93] Rather, the Court based its holding on the narrower ground[94] that censoring inmate correspondence consequentially implicated the First Amendment rights of nonprisoners.[95] The fact that the *Martinez* holding did not turn on prisoners' rights helps clarify the Court's departure from traditional judicial deference in the prison regulation context.[96]

B. Turner v. Safley *and the Four Factor Analysis*

In *Turner v. Safley*,[97] the Supreme Court reviewed the constitution-

---

tory" or "otherwise inappropriate" correspondence was "within the discretion of the prison administrators." *Id.* at 415-16. He also stated that the censoring of letters that "magnify grievances" or "unduly complain" protected against "flash riots" and furthered rehabilitation. *Id.* at 416. The Court noted, however, that the Director proffered no evidence to substantiate these claims. *Id.*

90. 416 U.S. at 416. Because prison officials had virtually unbridled discretion in determining what letters to censor, the regulations were overbroad. *Id.* at 415-16.

91. *Id.* at 416.

92. The Court first adopted the intermediate standard of review in Craig v. Boren, 429 U.S. 190 (1976). In order to survive intermediate scrutiny, the challenged regulation must be necessary to further an important governmental interest. *Id.* at 197.

93. *Martinez*, 416 U.S. at 408.

94. *Id.* The Court determined that it could supply the standard of review for regulations affecting correspondence between prisoners and civilians without resolving the "broad questions of 'prisoners' rights.'" *Id.*

95. *Id.* The Court noted that "[t]he wife of a prison inmate who is not permitted to read all that her husband wanted to say to her has suffered an abridgment of her interest in communicating with him as plain as that which results from censorship of her letter to him." *Id.* at 409.

Several courts have applied the *Martinez* intermediate scrutiny test to prisoner rights cases without mentioning the implicated rights of civilians. *See, e.g.*, Wali v. Coughlin, 754 F.2d 1015, 1033 (2d Cir. 1985) (holding that officials may impinge a prisoner's right to receive information only to further an important prison interest and cannot impose a restriction greater than necessary); Bradbury v. Wainwright, 718 F.2d 1538, 1545 (11th Cir. 1983) (holding that restrictions on prisoner marriages must be necessary for rehabilitation and security purposes and no more restrictive than needed to meet these interests).

96. *See supra* notes 45-51 and accompanying text for discussion of courts' traditional approach to prisoner rights cases.

97. 482 U.S. 78 (1987).

ality of prison regulations restricting inmate marriages and inmate-to-inmate correspondence.[98] The Court declined to apply the *Martinez* test to the challenged regulations. Instead, the Court confronted the issue left unresolved in *Martinez*: the proper standard to apply in cases involving only prisoners' rights.[99] The Court noted four post-*Martinez* prisoner rights cases[100] in which it refrained from applying the intermediate scrutiny standard.[101] The Court then articulated a reasonableness standard applicable to regulations that encroach on inmates' constitutional rights.[102]

---

98. *Id.* at 81. The correspondence regulation allowed communication "with immediate family members who are inmates in other correctional institutions" and between inmates if "concerning legal matters." *Id.* The prison prohibited any other correspondence between inmates unless "the classification/treatment team of each inmate deem[ed] it in the best interest of the parties involved." *Id.* at 81-82. The marriage regulation allowed inmate marriages only with the permission of the prison superintendent and then only if he found "compelling reasons." *Id.* at 82. At trial, prison officials testified that they usually considered only a pregnancy or the birth of an illegitimate child to constitute "compelling" reasons. *Id.*

99. *Id.* at 85-86.

100. *Id.* at 86-87. In Pell v. Procunier, 417 U.S. 817 (1974), inmates challenged, on First Amendment grounds, a rule prohibiting them from participating in in-person interviews with the media. *Id.* at 819. The Court rejected the challenge, noting that courts should refrain from second-guessing prison officials' decisions regarding security absent evidence indicating these decisions are magnified responses to such considerations. *Id.* at 827.

In Jones v. North Carolina Prisoners' Union, 433 U.S. 119 (1977), inmates challenged the prison rules regulating their labor union's activities. *Id.* at 121. The Court dismissed the complaint, noting that the rules banning solicitation were "rationally related to the reasonable, . . ., objectives of prison administration." *Id.* at 129.

In Bell v. Wolfish, 441 U.S. 520 (1979), the Court considered the constitutionality of a rule restricting prisoners from acquiring hardcover books, except when publishers, book clubs, or bookstores sent them directly. *Id* at 528. The Court upheld the regulation as a "rational response" to prison security. *Id.* at 550.

Finally, in Block v. Rutherford, 468 U.S. 576 (1984), the Court upheld a prohibition on contact visits, observing that "reasonable, experienced administrators have determined, in their sound discretion, that such visits will jeopardize the security of the facility," and, therefore, the regulation was "reasonably related" to their concerns. *Id.* at 586-89.

101. *Turner*, 482 U.S. at 87. The Court noted that these four cases employed a standard similar to traditional rational basis review: if the prison regulation burdening a fundamental right was "rationally related" to legitimate institutional objectives, and not an "exaggerated response" to these objectives, the Court would uphold it. *Id.*

102. *Id.* at 89. The Court appeared to revert back to "hands-off" deference to prison administrators. The Court feared that subjecting prison regulations to strict scrutiny analysis would impede officials' ability to create solutions to serious security problems, forcing them to search for the least restrictive means to effectuate their goals. *Id.*

The Court proposed four factors pertinent to determining the reasonableness of the challenged regulation.[103] First, a court must find a valid, logical connection between the regulation and the penological interest allegedly justifying it.[104] Second, the court should inquire whether the regulation allows inmates alternative means of exercising the constitutional right.[105] Third, the court will consider the repercussions that accommodation of the asserted right will have on prison guards, other inmates, and the general allocation of prison resources.[106] Finally, the court will determine whether the lack of immediate alternatives supports the regulation's reasonableness.[107]

While the Court upheld the correspondence provision,[108] it struck down the marriage regulation under the four factor test.[109] Because inmates retain the fundamental right to marry during incarceration,[110] the *Turner* test mandates that a reasonable connection exist between

103. *Id.* at 89-91.

104. *Id.* at 89. If the "logical connection" between the rule and the governmental interest is "so remote as to render the policy arbitrary or irrational," the Court will strike the rule down. *Id.* at 89-90. Furthermore, the governmental interest must be "legitimate and neutral." *Id.* at 90.

105. *Id.*

106. 482 U.S. at 90. The Court noted that courts should be highly deferential to the discretion of prison officials when accommodation of the right creates a negative "ripple effect" on other prisoners or prison staff. *Id.*

107. 482 U.S. at 89. The availability of clear, simple alternatives may reveal that the regulation is an unreasonable, "exaggerated response" to prison concerns. *Id.* The Court explicitly stated that it would not utilize a "least restrictive alternative" test. *Id.* at 90-91. If, however, "an inmate . . . can point to an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard." *Id.* at 91.

108. *Id.* at 93. The Court found that (1) legitimate security concerns justified the rule, (2) a nexus existed between the rule and these concerns, (3) the rule was not an absolute bar to all means of expression, (4) accommodation of prisoners' rights would result in less security for others, and (5) no easy alternatives were available. *Id.* at 91-93. *See supra* note 98 for the scope of the correspondence provision.

109. *Id.* at 99. *See supra* note 98 for a description of the marriage regulation.

110. *Id.* at 95-96. While conceding that the marriage relationship is necessarily restricted in the prison setting, the Court noted that many attributes of the relationship survive. *Id.* at 95. The Court pointed out that marriage demonstrates "emotional support and public commitment;" that it may sometimes be of religious significance; that inmates, like non-inmates, expect the marriage to ultimately be consummated; and that marital status brings various legal entitlements. *Id.* at 95-96. The Court found the combination of these elements "sufficient to form a constitutionally protected marital relationship in the prison context." *Id.* at 96.

the regulation burdening that right and the proffered penological concerns.[111] The Court determined that the inflexible regulation lacked the requisite logical connection because simple alternatives existed that would place a minor burden on prison objectives.[112] In addition, the Court asserted that accommodation of marriage requests would not create a negative "ripple effect" on the needs of other inmates or prison staff.[113] The Court therefore held that the prison's marriage restriction was unconstitutional under the *Turner* analysis.[114]

Notably, although the *Turner* Court applied a reasonable relationship test to the prison regulations at issue, it did not intend for this standard to displace the *Martinez* test.[115] The *Martinez* test would logically not apply in *Turner* because the correspondence regulation prohibited only inter-inmate communications and did not implicate the constitutional rights of civilians. The Court recognized in dicta, however, that the marriage regulation consequentially burdened civilians' fundamental right to marry, and therefore the *Martinez* standard would apply.[116] The Court did not decide whether the marriage regulation met the *Martinez* standard because it invalidated the regulation under the less demanding reasonable relationship test.[117]

Both *Martinez* and *Turner* evince the Court's increased willingness to strike a balance between the competing interests at stake in prisoner rights cases. While the Court remains ever cognizant of the obstacles prison officials encounter every day in overcrowded and understaffed penal institutions, it also recognizes that it cannot ignore the needs of

111. 482 U.S. at 89. Missouri articulated both security and rehabilitation concerns to justify its marriage regulation. *Id.* at 97. In terms of security, it noted that "love triangles" might lead to violence among prisoners. *Id.* The rehabilitation concerns focused on the connection between female prisoners' dependence on abusive men and the crimes they committed. *Id.*

112. *Id.* at 98. Although the Court did not articulate such alternatives, it noted that in general federal prisoners may marry absent security or safety concerns. *Id.* (citing 28 C.F.R. § 551.10 (1986)). The Court also asserted that prison officials could, consistent with the four-factor test, regulate the time and circumstances of a marriage ceremony. *Id.* at 99.

113. *Id.* The Court noted that if a prisoner wished to marry a civilian, the decision would only affect those two parties. *Id.*

114. *Id.*

115. *Id.* at 97. The Court noted that although the regulation's infringement on the interests of civilians would support the application of *Martinez*, that issue was not before the court. *Id.*

116. 482 U.S. at 97.

117. *Id.*

those prisoners whose constitutional rights may be overlooked in the process.[118] It remains unclear, however, just how rigorously the Court will review prison regulations having circumstantial effects on the rights of unincarcerated individuals.[119] After the Court's recent decision in *Thornburgh v. Abbott*,[120] the prospects for continued application of the *Martinez* test are tenuous.[121] Although the *Thornburgh* Court did not explicitly overrule *Martinez*, it markedly narrowed its scope.[122]

C. Thornburgh v. Abbott: *A Return to Rubber Stamping?*

In *Thornburgh*, the Court faced a First Amendment challenge to regulations[123] permitting inmates to receive outside publications,[124]

---

118. Commentators argue that the Court's standards still give too much deference to prison officials. *See* RUDOVSKY, *supra* note 5, at xiii (arguing that prisoner rights remain "illusory" and that "[i]mplementation and enforcement of these rights [remains] primarily in the hands of prison officials who continue to struggle to maintain the status quo").

119. Some commentators believe that *Turner's* reasonable relation test will soon apply to all prisoner rights cases. *See, e.g.*, William M. Roth, Note, Turner v. Safley: *The Supreme Court Further Confuses Prisoners' Constitutional Rights*, 22 LOY. L.A. L. REV. 667, 697 (1989) (determining that it is "highly unlikely" that *Martinez* survives *Turner*). *But see The Supreme Court, 1988 Term: Leading Cases*, *supra* note 51, at 246. ("*Turner* implicitly affirmed both the *Martinez* standard of scrutiny and its greater protection of noninmate rights.").

120. 490 U.S. 401 (1989). *See infra* notes 123-46 for discussion of the *Thornburgh* case.

121. Several Supreme Court decisions since *Martinez* seemed to ignore its test for prison regulations infringing on the rights of unincarcerated individuals, and instead upheld regulations under a rational basis standard. *See* Block v. Rutherford, 468 U.S. 576, 589 (1984) (upholding regulations prohibiting pretrial detainees from receiving contact visits); Bell v. Wolfish, 441 U.S. 520, 550 (1979) (upholding regulations regarding hardback books sent into prison); Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 136 (1977) (upholding rules restricting the rights of a prisoners' union to send literature into prison); Pell v. Procunier, 417 U.S. 817, 835 (1974) (upholding proscriptions on face-to-face media interviews with certain inmates).

122. *See infra* notes 123-146 and accompanying text for discussion of the *Thornburgh* decision.

123. The plaintiffs included a class of prisoners at the Marion Federal Penitentiary and certain publishers who claimed that the regulations promulgated by the Federal Bureau of Prisons violated their constitutional rights under *Martinez*. *Thornburgh*, 490 U.S. at 403.

124. *Id.* The Bureau defined "publication" as "a book (for example, novel, instructional manual), or a single issue of a magazine or newspaper, plus . . . advertising brochures, flyers, and catalogues." 28 C.F.R. § 540.70(a) (1992).

but authorizing prison officials to reject[125] any publications inimical to prison security.[126] The Court recognized that these regulations not only restricted the constitutional rights of the inmates, but also those of publishers intending to gain access to the prison through subscriptions.[127] The Court was responsive, however, to the arduous task of balancing the need for institutional order and security against the legitimate interests of "outsiders" seeking to enter the prison confines.[128] Against this backdrop, the Court considered the appropriate standard for reviewing prison rules restricting incoming publications.

While the Court of Appeals used the *Martinez* standard,[129] the Court noted that its post-*Martinez* decisions applied a reasonableness test to challenged regulations affecting the rights of *both* prisoners and nonprisoners.[130] Those decisions reflected the Court's concern that

---

125. The regulations contained guidelines for prison officials to follow in determining whether to reject certain materials:

> Publications which may be rejected by a Warden include but are not limited to publications which meet one of the following criteria:
>
> (1) It depicts or describes procedures for the construction or use of weapons, ammunition, bombs or incendiary devices;
>
> (2) It depicts, encourages, or describes methods of escape from correctional facilities, or contains blueprints, drawings or similar descriptions of Bureau of Prisons institutions;
>
> (3) It depicts or describes procedures for the brewing of alcoholic beverages, or the manufacture of drugs;
>
> (4) It is written in code;
>
> (5) It depicts, describes or encourages activities which may lead to the use of physical violence or group disruption;
>
> (6) It encourages or instructs in the commission of criminal activity;
>
> (7) It is sexually explicit material which by its nature or content poses a threat to the security, good order, or discipline of the institution, or facilitates criminal activity.

28 C.F.R. § 540.71(b) (1992).

126. Prison officials were authorized to reject a certain publication "only if it is determined detrimental to the security, good order, or discipline of the institution or if it might facilitate criminal activity." *Id.*

127. 490 U.S. at 408.

128. *Id.* at 407. The Court noted its prior rulings dealing with the legitimate interests of civilians in the prison context. *See* Pell v. Procunier, 417 U.S. 817 (1974) (discussing access of lawyers and family members to prisoners); Procunier v. Martinez, 416 U.S. 389 (1974) (discussing access of journalists wanting information regarding prison conditions).

129. *See* Abbott v. Meese, 824 F.2d 1166, 1172 (D.C. Cir. 1987) (finding that the appropriate test for judging a prison censorship regulation that affects the constitutional rights of the publisher should be that enunciated in *Martinez*).

130. 490 U.S. at 410 n.9. The Court determined that "any attempt to forge separate standards for cases implicating the rights of outsiders" was inconsistent with its deci-

Martinez would effectively remove from prison officials the degree of discretion they had enjoyed previously and instead subject them to a least restrictive means standard.[131] In light of these concerns, and based on the facts of the case, the Court rejected *Martinez*[132] as the appropriate standard in favor of the *Turner* test.[133]

Applying the *Turner* analysis, the Court determined that the prison's goals of maintaining security, order, and discipline were legitimate[134] and that its regulations were rationally related to these objectives.[135] Although no alternatives existed for prisoners to receive materials the warden rejected, the Court noted that *Turner* only mandated that prisoners remain able to receive some publications.[136] Because a wide range of materials did not fall under the rule's prohibitions, the second prong of *Turner* was satisfied.[137] Further-

---

sions intervening *Martinez* and *Turner*. *Id*. *See supra* note 100 for discussion of cases decided between *Martinez* and *Turner*. Some commentators disagree with the *Thornburgh* Court's conclusion that post-*Martinez* cases questioned *Martinez*'s validity. *See, e.g.*, *The Supreme Court, 1988 Term: Leading Cases*, *supra* note 51, at 245 (arguing that post-*Martinez* cases "either implicitly affirmed the continuing vitality of *Martinez* or did not undermine it").

131. 490 U.S. at 410-11. The Court viewed strict scrutiny as inappropriate for "consideration of regulations that are centrally concerned with the maintenance of order and security within prisons." *Id*. at 410.

132. *Id*. at 414. In rejecting the *Martinez* standard, the Court distinguished *Martinez* from the facts before it. The Court found that *Martinez* centered on *outgoing* correspondence, an activity that logically did not implicate serious security concerns. *Id*. at 411. In contrast, *Thornburgh* dealt with incoming materials, which pose greater security problems. *Id*. at 412. The Court noted that with respect to incoming publications, "prisoners may observe particular material in the possession of a fellow prisoner, draw inferences about their fellow's beliefs, sexual orientation, or gang affiliations from that material, and cause disorder by acting accordingly." *Id*. at 412-13. The Court determined that it should allow officials the discretion to intervene before such disorder occurred. *Id*. at 413.

133. *Id*. at 414. The Court noted that, although the *Turner* test was more lenient than that enunciated in *Martinez*, the *Turner* standard was "not toothless." *Id*. *See supra* notes 103-07 and accompanying text setting forth the *Turner* test.

134. *Id*. at 415. The Court viewed prison security as "central to all other corrections goals." *Id*.

135. *Id*. at 416. The Court deferred to the Bureau's judgment that certain publications created an inexorable risk of prison disorder. *Id*. at 417.

136. 490 U.S. at 417-18. In *Turner*, the Court did not insist that inmates be afforded alternative means of communicating with other inmates. *Turner*, 482 U.S. at 92. The *Thornburgh* Court held that it sufficed under *Turner* if the challenged regulation left open some other avenues of communication, but not necessarily to other inmates. *Thornburgh*, 490 U.S. at 418.

137. *Thornburgh*, 490 U.S. at 418.

more, the Court found that allowing potentially dangerous publications into the prison would have a counteractive "ripple effect" on the safety of guards and other prisoners.[138] Finally, the Court noted that no easy alternatives existed to accommodate the prison's interests and to impose a lesser burden on inmates' and publishers' free speech rights.[139] Accordingly, the regulations passed the *Turner* test and were found facially valid.[140]

Just what remains of *Martinez's* concern for the rights of civilians affected by prison regulations after *Thornburgh* is debatable. The *Thornburgh* Court explicitly overruled *Martinez* as the standard applicable to incoming materials, even those from nonprisoners.[141] The Court noted that *Martinez* continued to apply only to regulations restricting outgoing correspondence.[142] It appears unlikely, however, that the Court retained this portion of *Martinez* out of respect for the burdened rights of civilians.[143] Indeed, the Court specifically stated that the *Martinez* Court invalidated the challenged regulation because outgoing correspondence did not, by nature, impose a substantial threat to prison security.[144] This language demonstrates that the *Thornburgh* Court deemed the *Martinez* regulation, like the marriage regulation in *Turner*, an exaggerated response to prison concerns and,

138. *Id.* Because the regulations only proscribed those publications detrimental to prison security, the Court noted that if the publications circulated throughout the system, they could cause "significantly less liberty and safety" for everyone. *Id.*

139. *Id.* The Bureau maintained an "all-or-nothing" policy, pursuant to which if the warden determined that the material fell within the rubric of the rule, he would reject the entire publication. *Id.* at 406-07 n.8. Although the Court noted that removing the dangerous portions of the publication would impose a lesser burden on the parties' constitutional rights, it deferred to the trial court's finding that this alternative would "create more discontent than the current practice." *Id.* at 418-19. It therefore determined that the Bureau's policy was not an "exaggerated response" under *Turner*. *Id.* at 419.

140. *Id.* at 419.

141. *Id.* at 413. The Court refused to draw a line between regulations, which were upheld in *Turner*, that restricted incoming correspondence from prisoners at other institutions, and those that restricted incoming correspondence from nonprisoners. *Id.*

142. 490 U.S. at 413. The *Martinez* Court noted that it was unreasonable for prison officials to expect that outgoing letters which magnified prisoners' grievances or contained inflammatory remarks would have an effect inside the prison. *Martinez*, 416 U.S. at 416.

143. Not only did the *Thornburgh* Court not recognize *Martinez* as a civilians' rights case, it also stated that it was unwilling to create different standards for prisoner rights and nonprisoner rights cases. *Thornburgh*, 490 U.S. at 410 n.9.

144. *Id.* at 411.

therefore, incapable of surviving even minimal scrutiny. Unfortunately, a prison regulation may ultimately stand or fall depending on whether the Court applies the *Martinez* or *Turner* standard.[145] It appears certain that, in most post-*Thornburgh* prisoner rights cases the Court will return eagerly to its traditional position of rubber stamping the decisions of prison administrators.[146]

III. PRISONERS AND A NEW ANGLE ON THEIR PROCREATIONAL RIGHTS

Prisoners have never presented the Supreme Court with constitutional privacy issues comparable to those that the San Quentin death row inmates raise in their challenge to a prison policy denying their requests for artificial insemination. The Eighth Circuit in *Goodwin v. Turner*,[147] however, faced a suit remarkably similar to the San Quentin inmates' challenge.

A. Goodwin v. Turner

In *Goodwin*, a prisoner challenged an institutional policy prohibiting[148] him from artificially inseminating[149] his wife.[150] The Eighth

145. *See* T. Joe Snodgrass, Note, *A Call For Strict Scrutiny: Eighth Circuit Denies Inmate's Request for Artificial Insemination*, 17 WM. MITCHELL L. REV. 883, 898 n.111 (1991) (noting that the Court has upheld regulations in all prisoner rights cases after *Turner* under a rational basis standard).

146. The *Thornburgh* Court, by approving the *Turner* test, made it clear that lower courts should follow its lead in extending great deference to the decisions of prison administrators. *See* Megan M. McDonald, Note, Thornburgh v. Abbott: *Slamming the Prison Gates on Constitutional Rights*, 17 PEPP. L. REV. 1011, 1040-41 (1990). Consequently, under the deferential *Turner* standard, the rights of free citizens will most certainly go unprotected. *Id.* at 1042.

147. 908 F.2d 1395 (8th Cir. 1990).

148. *Id.* at 1397. At the time the prisoner requested authorization to artificially inseminate his wife, the Bureau had no established procedure to accommodate his request. *Id.* After a ruling by a magistrate that the lack of such provisions violated the prisoner's due process rights, the Bureau adopted a policy regarding artificial insemination. *Id.* The policy reflected the Bureau's concerns regarding the expenditure of resources and security risks involved in accommodating the requests. *Id.* at 1397-98. It further expressed the fear that, following its policy of treating inmates equally, it would have to expend substantial resources to accommodate female inmates' requests. *Id.* at 1398. Therefore, the policy denied all requests for artificial insemination. *Id.* at 1397.

149. *Id.* The prisoner argued that accommodation of his request would not entail added expenditures or impose an unnecessary security risk because he was only asking for a clean container in which to ejaculate and the means to quickly carry the semen to

Circuit recognized the fundamental right to procreate[151] and assumed that this right was not inconsistent with a prisoner's incarcerated status.[152] The court determined, however, that the policy was reasonably related to the prison's legitimate penological interests.[153]

The prisoner argued that the policy directly affected the procreational rights of his wife, and therefore the court should review it under the *Martinez* heightened scrutiny standard.[154] The court, however, deemed the wife's rights irrelevant to its determination and therefore used the *Turner* analysis.[155] The court found the regulation rationally related to the prison's legitimate[156] policy of attempting to deal with male and female inmates on equal terms.[157] The court further noted

---

his wife. *Id.* at 1398. The prisoner also offered to pay for any expenses incurred. *Id.* at 1398 n.5.

150. *Id.* at 1396. Although the prisoner was soon eligible for parole, and his latest release date was in 1995, he and his wife desired to conceive immediately because they were concerned that postponing conception would increase the chances of their child having Downs Syndrome. *Id.* at 1396. The prisoner's wife was thirty years old at the time of suit. *Id.*

151. *Id.* at 1398. In concluding that procreation was a fundamental right, the court relied on the leading Supreme Court cases. *See supra* note 27 for a list of Supreme Court cases noting the fundamental nature of the decision whether to procreate.

152. *Goodwin*, 908 F.2d at 1398. The trial court, however, determined that procreation was inconsistent with imprisonment. Goodwin v. Turner, 702 F. Supp. 1452, 1454 (W.D. Mo. 1988).

153. *Goodwin*, 908 F.2d at 1398. The Bureau noted its interests in proscribing artificial insemination in its policy statement:

> [S]ound correctional policy dictates against allowing inmates to artificially inseminate another person . . . [I]f [artificial insemination were] allowed in one case, all of [the Bureau's] institutions would either have to develop collection, handling, and storage procedures for semen or be opened up to private medical or technical persons to come in to collect the semen. This situation would either require a significant drain on resources or create significant security risks, especially in connection with inmates with a high security classification . . . .

Id. at 1397-98.

154. *Id.* at 1399.

155. *Id.* The court refused to apply strict scrutiny in every case implicating the rights of family members. *Id.* It determined that as long as restrictions on prisoners' rights were reasonably related to legitimate penological objectives, the interests of third parties simply were not relevant. *Id.*

156. *Id.* The court rejected other interests advanced by the Bureau, such as "decreased burden on the welfare roles" and tort liability, as illegitimate and irrelevant. *Id.* at 1399 n.7.

157. *Id.* The court determined that forcing the Bureau to accommodate equally female prisoners' procreational rights would entail vast increases in prison expenditures, especially because the Bureau would then have to provide infant care. *Id.* at 1400.

Some commentators argue that, in recognizing the Bureau's equal treatment policy,

that, although the policy left the prisoner without any means of impregnating his wife,[158] the absence of ready alternatives evidenced the reasonableness of the policy.[159] Finally, the court determined that indulging the inmate's request would create a negative "ripple effect" because the increased expenditures necessary to accommodate his interest would result in decreased resources in other areas of the prison.[160] Therefore, the court held that the policy was valid under the *Turner* reasonable relationship test.[161]

In a spirited dissent, Judge McMillian recognized that the policy directly infringed on the rights of nonprisoners, but he hesitated to apply *Martinez* because of its questioned validity after *Thornburgh*.[162] The dissent asserted, however, that the policy could not survive even under the *Turner* analysis.[163] The dissent argued that the policy of treating male and female inmates equally[164] was illegitimate because it burdened a fundamental right the prison could otherwise accommodate.[165] Furthermore, the dissent refused to trivialize the fact that the policy left the prisoner completely unable to exercise his procreational rights.[166] Judge McMillian also asserted that accommodation of the

---

the Eighth Circuit created a new penological interest that the Supreme Court had never legitimized. *See* Edith T. Peebles, Note, *Steven J. Goodwin is Doing Federal Time, and We Won't Let Him Be a Father—The Erosion of the Rights of Federal Prisoners:* Goodwin v. Turner, 24 CREIGHTON L. REV. 1165, 1189 (1991). *See also supra* notes 45-68 and accompanying text for further discussion of penological interests.

158. The district court found it significant that, because the prisoner was due for imminent release, the regulation did not permanently deprive him of the right to procreate but merely delayed its exercise. *Goodwin*, 702 F. Supp. at 1454.

159. *Goodwin*, 908 F.2d at 1400.

160. *Id.* The court noted that this burden on other prisoners' interests was the kind of "ripple effect" with which the *Turner* Court was concerned. *Id.*

161. *Id.*

162. *Id.* at 1401 n.1 (McMillian, J., dissenting).

163. *Id.* at 1401.

164. While the dissent recognized equal treatment for prisoners as a legitimate interest, it also noted that this interest was not as weighty as a prison's interest in security and discipline. *Goodwin*, 908 F.2d at 1405 n.5 (McMillian, J., dissenting).

165. *Id.* at 1405. The dissent feared that if equal treatment was sufficient to deny inmates otherwise accommodatable rights, this would give prisons carte blanche to deny all constitutional rights because "it is quite likely that any asserted right might legitimately be withheld from some inmates somewhere." *Id.* The dissent also determined that the Bureau's real concerns were administrative, using equal treatment as a pretext. *Id.*

166. *Id.* at 1405-06. The dissent criticized the majority's focus on the wife's associational rights, which logically are restricted as a result of her husband's incarceration.

request would impose a negligible burden on the prison and other inmates.[167] Finally, the dissent suggested that the alternative of addressing artificial insemination requests individually would impose a de minimis cost on the prison and allow inmates to exercise their right to procreate.[168] The dissent, therefore, would hold the prison's prophylactic measures unconstitutional.[169]

B. *Goodwin and Its Implications for Death Row Inmates*

The *Goodwin* court, utilizing the *Turner* four-prong test, purported to balance penological interests against prisoners' procreative rights.[170] The Supreme Court articulated the *Turner* test, however, in a case concerning prisoners' free speech and marriage rights.[171] The *Goodwin* court's mechanical application of *Turner* rests on the false premise that policies regulating free speech and marriage are so indistinguishable from those proscribing the exercise of procreational rights that the exact same judicial test should be applied.[172] The *Goodwin* court failed to acknowledge the substantial ramifications the prison policy had on inmates' residual interest in procreation. In addition, the *Goodwin* court's myopic view of the asserted penological concerns effectively allowed it to apply a toothless *Turner* standard.[173] Finally, the unrea-

---

Id. at 1405 n.6. The dissent instead would focus on the regulation's complete foreclosure of her right to procreate. *Id.*

167. *Id.* at 1406. Because the prisoner only requested a clean container and swift means of returning the container to his wife, the dissent determined that the potential impact on the prison was insignificant. *Id.* Furthermore, the dissent criticized the majority's emphasis on the accommodation of female inmates' requests for artificial insemination, because this issue was not before the court. *Id.* at 1406-07.

168. *Id.* at 1407. In individually determining artificial insemination requests, the prison could legitimately deny a request if its accommodation would necessitate a substantial diversion of prison resources. *Id.*

169. *Goodwin*, 908 F.2d at 1407 (McMillian, J., dissenting). Commentators have concurred with Judge McMillian's conclusion that the Bureau's policy illegitimately burdened the prisoner's fundamental right to procreate. *See* Peebles, *supra* note 157, at 1196 (arguing that the Bureau's regulation was an "exaggerated response" to the prisoner's request).

170. *Goodwin*, 908 F.2d at 1399. The dissent also applied the *Turner* test, recognizing that *Thornburgh* questioned the continuing validity of *Martinez*. *Id.* at 1401 n.1 (McMillian, J., dissenting).

171. *See supra* notes 98-122 and accompanying text for a discussion of *Turner*.

172. Some commentators argue that prison regulations burdening the right to procreate have more impact on third parties than mail regulations, and, therefore, courts should scrutinize them more closely. *See* Snodgrass, *supra* note 145, at 911.

173. *See supra* note 153 for a statement of the prison's purported concerns.

sonableness of the *Goodwin* holding becomes noticeably more pronounced when applied to death row inmates' requests for artificial insemination.

The *Goodwin* court mistakenly viewed the impracticality of treating male and female inmates' procreational rights equally as justification for the prison's blanket policy.[174] While courts generally should mandate equal treatment in the prison context,[175] they cannot ignore the genuine biological differences that exist between men and women with respect to procreation. The Supreme Court has held that regulations based on real differences between the sexes,[176] as opposed to cultural stereotypes,[177] can be constitutional. Obviously, allowing female in-

174. *See supra* note 157 and accompanying text discussing the impracticality of accommodating men and procreational rights.

175. *Compare* Glover v. Johnson, 855 F.2d 277, 281 (6th Cir. 1988) (dictum) (providing male inmates education and vocational training not afforded females violates equal protection); Inmates of Allegheney County Jail v. Wecht, 565 F. Supp. 1278, 1286 (W.D. Pa. 1983) (holding that prison officials should afford male and female inmates equal access to library); Dawson v. Kendirck, 527 F. Supp. 1252, 1317 (S.D. W. Va. 1981) (stating that equal protection mandates parity in programming for male and female inmates); *with* Jackson v. Thornburgh, 907 F.2d 194, 196-99 (D.C. Cir. 1990) (finding no equal protection violation when men in a federal facility benefit from early release statute more than women because women imprisoned for over one year must be sentenced to a federal facility not covered by the statute); Morrow v. Harwell, 768 F.2d 619, 626 (5th Cir. 1985) (holding that prison regulations allotting greater visitation time for male inmates did not violate the Equal Protection Clause because males made up a larger proportion of the prison population and no inmate received increased time based on gender).

176. *See, e.g.*, Rostker v. Goldberg, 453 U.S. 57, 78-79 (1981) (holding that the congressional decision requiring only men to register for draft did not violate equal protection because men and women are not similarly situated with respect to conscription); Michael M. v. Superior Court, 450 U.S. 464, 473 (1981) (stating that a law punishing only males for statutory rape is not unconstitutional because the risk of pregnancy deters females while "no similar sanction deters males"); Dothard v. Rawlinson, 433 U.S. 321, 335-36 (1977) (stating that because male inmates might rape female prison guards due to their "very womanhood," no equal protection violation existed for failing to hire women as prison guards).

177. When courts recognize that statutes distinguishing between sexes are based on "arbitrary and outmoded" social conventions, they deem such distinctions "insufficient to justify explicit legal differentiation between the sexes." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1571 (2d ed. 1988). *See, e.g.*, Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 729-30 (1982) (holding that discrimination against men in admission to women's nursing school "perpetuat[ed] the stereotyped view of nursing as an exclusively woman's job"); Califano v. Goldfarb, 430 U.S. 199, 217 n.18 (1977) (noting that a Social Security provision paying survivor benefits to widower only if he could prove dependency on deceased wife was invalid because it was based on a presumption that only wives are dependent on spouses).

mates equal access to methods of artificial insemination raises significant institutional concerns not implicated when prison officials allow males to preserve their sperm.[178] These concerns become manifold when female death row inmates seek equal treatment, for artificial insemination could permit them to stay their executions indefinitely in order to prevent the death of their fetuses.[179] Therefore, male and female inmates are not similarly situated with respect to procreation, and courts should not uphold policies denying male inmates the right to freeze their sperm solely in the name of equality.

Male inmates' requests for artificial insemination also do not implicate legitimate penological concerns, such as internal security and discipline. Contrary to conjugal visitation, which involves officials providing private facilities and increasing security measures,[180] male inmates requesting artificial insemination merely require a sterile container and a means of transporting their semen out of the prison complex.[181] Furthermore, while death row inmates may pose the highest security risk among the prison population,[182] allowing them to preserve their sperm would not increase the risk of escape or violence. Therefore, no legitimate penological interests are involved in artificial insemination requests, and policies proscribing them fail to survive *Turner*'s test of rationality.[183]

178. The *Goodwin* majority cited numerous problems with allowing female inmates to be artificially inseminated. *Goodwin*, 908 F.2d at 1400. These problems included significant increases in medical services for female inmates and the resulting financial burden due to infant care. *Id.*

179. *See* Ellen Goodman, *Prisoners of Love? Death Row Inmates' Demands to Procreate Were Inevitable*, CHI. TRIB., Jan. 12, 1992, at 4C (noting that if female death row inmates could remain pregnant, they could feasibly stay their execution until menopause).

180. *See supra* notes 62-68 and accompanying text for a discussion of the security concerns surrounding conjugal visitation.

181. The prisoner in *Goodwin* initially requested that doctors enter the prison to collect his semen using sanitary procedures and proper freezing techniques. *Goodwin*, 908 F.2d at 1397. He later amended his request, however, and asked only that the Bureau provide him with a clean container in which to ejaculate and a swift means to carry the semen to his wife. *Id.* at 1398.

182. *See* Wilson v. Nevada Dep't of Prisons, 511 F. Supp. 750, 751 (D. Nev. 1981) (noting that death row inmates are the most incorrigible, create the greatest security risk, are more capable of violence, and are the most likely to escape of all inmates).

183. The first prong of the *Turner* test asks whether a " 'valid, rational connection' [exists] between the prison regulation and the legitimate governmental interest put forward to justify it." *Turner*, 482 U.S. at 89 (quoting Block v. Rutherford, 468 U.S. 576, 586 (1984)). *See supra* notes 103-07 and accompanying text for a discussion of the *Turner* test.

The second prong of the *Turner* analysis focuses on whether alternative means of exercising the asserted right remain open to the prisoner.[184] The *Goodwin* court conceded that under the blanket artificial insemination policy, the prisoner retained no means to procreate.[185] The court noted, however, that the lack of procreational alternatives arose from the fact that none could exist without compromising prison policy.[186] This lack-of-alternatives rationale completely fails to account for the prisoner's right to procreate.[187] Applying this rationale to death row inmates' requests would be even more egregious, because they can never anticipate their eventual release and concomitant freedom of procreational choice.[188] For security reasons, all fifty states deny conjugal visits to death row inmates.[189] Refusing them access to artificial insemination, with its de minimis impact on penological interests, would amount to constructive sterilization and thereby raise the reproductive concerns noted by the *Skinner* Court.[190] Therefore, proscriptions on artificial insemination, accompanied by the failure to provide conjugal visitation, fail the second *Turner* prong.

Regulations forbidding artificial insemination also do not survive the remaining prongs of *Turner*.[191] Allowing male inmates to exercise their right to procreate through means of artificial insemination creates

184. *Turner*, 482 U.S. at 90.

185. *Goodwin*, 908 F.2d at 1400.

186. *Id.* The *Goodwin* dissent criticized the majority for injecting the prison's interest into this prong of the *Turner* test, because it effectively removed the focus from the prisoner's injury and "improperly weigh[ed] the alleged burden on the prison twice." *Id.* at 1406 (McMillian, J., dissenting).

187. In *Turner*, the Court emphasized that the mail policy did not deprive inmates of all means of expression, but only restricted communication with a limited class of people. *Turner*, 482 U.S. at 92. Therefore, the *Turner* Court deemed it important that the policy allowed prisoners to retain some free speech rights.

188. The *Goodwin* prisoner's latest release date was February 26, 1995. *Goodwin*, 908 F.2d at 1396. In contrast, although courts may reverse their death sentences, death row inmates do not face the possibility of parole or release. *See* Welsh S. White, *Review Essay: Patterns in Capital Punishment*, 75 CAL. L. REV. 2165, 2169 n.15 (1987).

189. Valerie Richardson, *14 on Death Row Are Just Dying to Become Daddies*, WASH. TIMES, Dec. 31, 1991, at A3.

190. *See supra* notes 28-34 and accompanying text for a discussion of the *Skinner* Court's concerns surrounding prisoner sterilization.

191. Under the third *Turner* prong, a court must consider "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." *Turner*, 482 U.S. at 90. The final *Turner* prong notes that "the absence of ready alternatives is evidence of the reasonableness of a prison regulation." *Id.*

a negligible impact on prison security.[192] In addition, if inmates agree to bear any incurred expenses, prison officials need not funnel scarce resources away from other areas to accommodate their request.[193] Furthermore, alternatives to a blanket ban exist, and courts, instead of deferring to prison administrators, should require them to explore less restrictive policies.[194]

Finally, while the *Goodwin* court was arguably correct in choosing to apply *Turner*, courts faced with artificial insemination requests cannot ignore that the *Thornburgh* Court did not overrule *Martinez* completely.[195] The Court's hesitation to discard *Martinez* may evidence its continued willingness to afford civilians some weight in the prisoner rights balance when recognition of their rights would not implicate penological interests. Prison regulations that prohibit inmates from artificially inseminating their wives are premised on illegitimate or irrational institutional concerns. In addition, such regulations completely eliminate inmates', and effectively restrict civilians', fundamental right to procreate.[196] Therefore, courts confronting artificial insemination challenges should reject the *Goodwin* analysis and apply a *Turner* standard that better scrutinizes all the interests involved.[197]

IV. CONCLUSION

Courts must not allow prison officials to deny inmates' requests to

192. *See supra* notes 180-83 and accompanying text for a discussion of how requests for artificial insemination do not implicate security concerns.

193. The *Goodwin* prisoner offered to pay any necessary costs involved in the procedure. *Goodwin*, 908 F.2d at 1398 n.5. The San Quentin death row inmates have also offered to pay the costs of the process and, in addition, furnish proof that the recipient of the donated sperm has the financial means to raise the child. Jim Doyle, *Death Row Inmates Want to Be Fathers*, S.F. CHRON., Dec. 31, 1991, at A13.

194. The *Goodwin* dissent noted that prisons could approach inmates' requests on an individualized basis as opposed to imposing a blanket ban on all requests. *Goodwin*, 908 F.2d at 1407 (McMillian, J., dissenting).

195. The *Thornburgh* Court determined that the *Martinez* standard should be limited to policies concerning outgoing mail, which, by its nature, did not present security concerns similar to incoming communications. *Thornburgh*, 490 U.S. at 413. *See supra* note 132 for discussion of the Court's reasoning.

196. Artificial insemination would enable wives to retain the fundamental right to procreate with their husbands, thereby assuring that prison officials do not punish innocent individuals for the crimes of their spouses. Snodgrass, *supra* note 145, at 905.

197. Arguably, courts should utilize a strict scrutiny standard to review inmates' requests for access to artificial insemination. *See id.* In all probability, however, if the San Quentin case reaches the Supreme Court, the Court will apply the *Turner* test.

exercise their right to procreate by means of artificial insemination. The right to procreate through artificial insemination is not inconsistent with prisoners' incarcerated status, even those prisoners on death row. Furthermore, proscriptions on artificial insemination unreasonably affect civilians' procreational rights and, similar to the outgoing correspondence regulations in *Martinez*, serve no legitimate penological concerns.[198] Therefore, courts must not accept officials' unsubstantiated reasons for rejecting artificial insemination requests, lest the unbridled power to constructively sterilize prisoners reverts to the hands of the state.

*Kristin M. Davis**

198. *See supra* notes 80-96 and accompanying text for discussion of the *Martinez* case.

* J.D. 1993, Washington University.

COMMENTS